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October 22, 2011

Corbin R. Davis
Supreme Court Clerk
PO Box 30052
Lansing, MI 48909

Re: ADM File No. 2002-24

Dear Mr. Davis:

I urge the Court to modify the proposed changes to MPRC 7.3, because I believe that the language has deleterious consequences not intended by the drafters. I submit several options that would meet the apparent goals of the Court without creating unwanted results.

My remarks address two separate issues:

- The thirty-day ban in (c)(2) is too broad
- The term “solicit” needs further explanations in order to protect clients and the public in general.

I will address those issues in order.

The thirty-day ban in (c)(2) is too broad

The ban extends to all actions of potential claims that have arisen because of an injury, death, or accident. I assume that the intent was to create a sort of “resting period” before potential claimants for a tort claim are contacted by attorneys seeking business. The reach, however, is much broader. An attorney who drafted estate plans for a client is expected to contact fiduciaries and other family members who are supposed to put the plans into practice. At a minimum, the attorney may have original documents that he or she must deliver to the fiduciary or family members. In many instances, the successor fiduciaries may want the client’s attorney to represent the fiduciary. The plain language of this section would seem to forbid any written contact (even after contact by a potential client) that suggests that the attorney would be willing to represent the fiduciary. If an attorney is representing a client in some matter, e.g., a court case, an administrative hearing, etc., and the client dies, in most cases the matter continues but requires a substitution of parties. Certainly it makes sense for the attorney to

contact the likely substituted party about the situation, yet this rule seems to say that such contact is unethical. This is just too broad.

There are two reasonable fixes to this problem:

- Include an exception where the attorney is already representing the person who suffered the injury, death, or accident
- Limit the type of actions or potential claims that the rule covers

Most states that have cooling-off periods have chosen the latter approach, but I urge you to adopt the former. Either is better than the language as written.

Limiting the type of action or claim

The following examples are taken from a publication by the American Bar Association “Differences between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (January 1, 2011) found on-line at http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/state_advertising.authcheckdam.pdf . These examples highlight the differences among the states but some states’ rules do a better job of resolving this issue than others.

Alabama Rule 7.3(b)(1)(i): A lawyer shall not send, or knowingly permit to be sent, on a lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if: the written communication **concerns an action for personal injury or wrongful death** arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days before to the mailing of the communication.

Arizona Rule E.R. 7.3(b)(3): A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer’s behalf from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if: the solicitation **relates to a personal injury or wrongful death** and is made within thirty (30) days of such occurrence.

Arkansas Rule 7.3(c): In **death claims**, the written communication permitted by paragraph (b) shall not be sent until 30 days after the accident.

Colorado Rule 7.3(c): A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which **arise out of the personal injury or death** of any person by written, recorded, or electronic communication. This provision shall not apply if the lawyer has a family or prior professional relationship with the prospective client, or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited.

Connecticut Rule 7.3(b)(5): A lawyer shall not contact, or send, a written or electronic communication to, a prospective client, for the purpose of obtaining professional employment if: (5) The written or electronic communication concerns an action for personal injury or wrongful death or otherwise related to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to the mailing of the communication.

Florida Rule 4-7.4(b)(1)(A): A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

Georgia Rule 7.3(a)(3): A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if: the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

Hawaii Rule 7.3(e)(1): A lawyer shall not solicit professional employment from a prospective client on the lawyer's behalf or on behalf of anyone associated with the lawyer if: (1) the communication concerns an action for personal injury or wrongful death involving the person to whom the communication is addressed or a relative of that person, unless the personal injury or wrongful death occurred more than thirty (30) days prior to the sending of the communication.

Indiana Rule 7.3(b)(3): A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if: the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or

a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation.

Kentucky Rule SCR 3.130(7.09)(4): Any communication pursuant to Rule 7.09(3) shall be sent to those prospective clients who have been involved in a disaster as defined in SCR 3.130(7.60) Article III (1) only after thirty (30) days have elapsed from the occurrence of the disaster.

Louisiana Rule 7.4((b)(1)(A): A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.

Missouri Rule 4-7.3(c)(4): A lawyer shall not send, nor knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, the lawyer's partner, an associate or any other lawyer affiliated with the lawyer or the lawyer's firm a written solicitation to any prospective client for the purpose of obtaining professional employment if the written solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than 30 days prior to the solicitation or if the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person solicited makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

Nevada Rule 7.3(d) Target mail to prospective clients. Written communication directed to a specific prospective client who may need legal services due to a particular transaction or occurrence is prohibited in Nevada within 45 days of the transaction or occurrence giving rise to the communication. After 45 days following the transaction or occurrence, any such communication must comply with paragraphs (b) and (c) of this rule and must comply with all other Rules of Professional Conduct.

New Jersey Rule 7.3(b)(4): A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if (4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event.

New York Rule 7.3(e): No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

New York Rule 4.5(a) & (b):

(a) In the event of an incident involving potential claims for personal injury or wrongful death, no solicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee, or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

South Carolina Rule 7.3(b)(3): A lawyer shall not solicit professional employment from a prospective client by direct written, recorded or electronic communication or by in-person, telephone, telegraph, facsimile or realtime electronic contact even when not otherwise prohibited by paragraph (a), if the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person unless the accident or disaster occurred more than thirty (30) days prior to the solicitation.

Tennessee Rule 7.3(b)(3): A lawyer shall not solicit professional employment from a potential client by written, recorded, or electronic communication or by in-person, live telephone, or real-time electronic contact even when not otherwise prohibited by paragraph (a), if a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, worker's compensation, wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident or disaster occurred more than thirty (30) days

prior to the mailing or transmission of the communication or the lawyer has a family, close personal, or prior professional relationship with the person solicited.

Wyoming Rule 7.3(d): Any targeted communication to prospective clients by a lawyer in person, contact through a third party at the direction of the lawyer, by telephone, or real-time electronic contact is prohibited. Written communication by telegraph, facsimile, by mail or other writing, electronic communication or by any other means of communication directed to a specific prospective client with whom the lawyer has no family or prior professional relationship, who may need legal services due to a specific occurrence, is prohibited within thirty (30) days of the occurrence. After the thirty (30) days have elapsed exclusive of the day of the occurrence, written communication may be directed to a specific prospective client, but such written communication must comply with Rule 7.1 and 7.3(c).

The approach I urge the Court to consider focuses on the prior relationship to the victim:

If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim, **unless the person was a client of the lawyer.**

This change is narrowly tailored to address the perceived over-breadth. It is hardly a cold call unexpected and intrusive for the family when the person who suffered the injury, death, or accident was already a client of the lawyer. In fact, the family would expect contact in such situations.

This version also has several advantages over a limitation on classes of action. If the victim of an injury had hired a lawyer and the victim died, it would be reasonable for the lawyer to contact the family immediately about continuing or modifying the potential claim. Also, it might be difficult to imagine the potential claims that could be contemplated by an enterprising lawyer seeking clients by cold calls. The claim might not take the form of an action for personal injury or wrongful death. No matter what sort of claim, a thirty-day window would be established unless the victim was already a client.

Clarifying the nature of “solicitations”

Lawyers tend to be justifiably risk-averse with regard to the Michigan Rules of Professional Conduct. It is not worth it to come too close to the boundary of a rule. My fear is that lawyers may be so concerned with violations of the proposed rule that they will put the term “advertisement” on too many mailings. I used to work for an advertising agency before becoming a lawyer and know quite well that businesses seek business through communications that are not properly

advertising. For examples, businesses that sponsor cultural activities presumably do so primarily out of a charitable purpose but certainly hope that the association of their name with the activities will indirectly lead to more business. Lawyers who send out newsletters, legislative updates, information about weddings and other events involving personnel, Christmas and Chanukah cards, and so forth are not doing so primarily to seek new clients, but would not be unhappy if such mailings led indirectly to more business. The problem with the definition in MPRC 7.3 is the phrase “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”

I have no objection to applying existing (b) to such innocuous communication. Nothing we send out should be coercive, or cause duress or harassment. If someone expresses a wish not to hear from us, we shouldn’t send them anything at all.

We have to recognize the effect on recipient of a word like “Advertisement.” One effect is that the mailing is likely to go into the trash without being opened. If it’s truly an advertisement from a lawyer, I have no problem with that at all. If the mailing is something else, we are harming the public by encouraging them to toss it away unread.

I have been involved in efforts to combat elder abuse and exploitation. There are many con artists that concentrate on the elderly and make many misrepresentations. One common type of problem now involves contacting veterans and their families and offering false promises about benefits. It is a public service for attorneys to send out warnings about those types of scams. If the warnings have to be marked as an “advertisement”, they are much less likely to be effective. Although not as critical for public policy, it is also beneficial for people to receive legislative updates. For example, many people would have been happy to learn about the adoption of the Estates and Protected Individuals Code that it became possible for them to set aside funds to provide for their pets.

Furthermore, it seems to me that many of these mailings are not commercial speech, as that term is used in constitutional scholarship. True advertising is certainly covered, but newsletters whose primary purpose is to inform presumably are not. Non-commercial speech is entitled to enhanced constitutional protection.

I urge the Court to address this problem. There are several potential solutions:

- Require the lawyer to put an appropriate label on all communications to persons who are not clients or family members. If the purpose is primarily to seek new clients, mark it as “Advertising Material.” If not, mark it as “Newsletter,” “Legal Update,” or “Legislative Update,” as appropriate. I believe something like this is the rule in California.
- List certain types of communications that do not have to be marked as advertising. I would suggest including items such as newsletters, articles, material prepared by others that the lawyer is simply republishing, stories about personnel, holiday cards, legal updates, public service warnings about illegal or unwise activities, and so forth. I understand that Texas has a rule approximating this.

- Modify (c)(3) to restrict its application to communications where the **primary** purpose is advertising.

The third possibility is the simplest to draft and to apply. Here is one possibility:

Every written communication from a lawyer described in subsections (1) and (2) **where the primary motive is the lawyer's pecuniary gain** shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words "Advertising Material" shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner.

Certainly, there could be some disputes about the primary motive for a communication, but this version protects the public better. If the Court wishes to restrict actual advertising, this version accomplishes that goal. It does not have the deleterious effect of discouraging persons in need of advice and information from opening mailings that are not primarily advertisements, unlike what I fear the effect of the existing language would be.

I apologize for such a thorough response. I urge the Court to take these remarks into consideration.

Summary of Suggested Language:

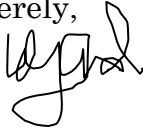
I realize that the intended changes can get lost in the verbiage. Here is my suggested revisions:

If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim, **unless the person was a client of the lawyer.**

Every written communication from a lawyer described in subsections (1) and (2) **where the primary motive is the lawyer's pecuniary gain** shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words

“Advertising Material” shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words “Advertising Material” shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Ard', with a stylized flourish at the end.

William Josh Ard